You'll never work alone

Common Market Law Review **58**: 683–718, 2021.

YOU'LL NEVER WORK ALONE: A SYSTEMIC ASSESSMENT OF THE EUROPEAN ARREST WARRANT AND JUDICIAL INDEPENDENCE

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Abstract

The adage is that the European Arrest Warrant (EAW) is built on the principle of mutual trust: the presumption that Member States comply with fundamental rights save in exceptional circumstances. However, the very existence of the EAW rests on the proper interpretation and application of fundamental rights standards, and on sincere cooperation between judicial authorities. With that in mind, the present article gives a systemic analysis of the EAW. After outlining the key features of its functioning, the paper discusses the system of exceptions to surrender: mandatory and optional grounds for refusal in the EAW Framework Decision (FD), the fundamental rights exception, and cases of invalidity. As the EAW is based on automaticity, the exceptions define the traits of its identity. The article's conclusions reveal the importance of sincere cooperation to strengthen mutual trust, with judicial independence as an essential precondition. The article's comprehensive assessment offers an original contribution to the debate about judicial independence in EU law, the operation of the EAW and its role in the wider context of the Union as a legal order.

1. Introduction

In a famous novel, the detective protagonist faces a dilemma. The author of a most heinous crime, who managed so far to escape justice, dies – it will be revealed at the end – in a plot at the hand of the persons whose lives had been shattered by that past foul play. After solving the mystery and identifying the culprits, the detective must decide whether to offer the local authorities a credible but false version of what happened and save the perpetrators from prosecution, or to report the truth. Such a conflict embodies – in a particularly

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extreme way – philosophical questions around the meaning and operation of the law: to what extent can legal procedures be overstretched or even ignored to pursue a different – "strict" – sense of justice? To what extent can the avoidance of impunity be justified?

In EU law, few measures better encapsulate those quandaries than the EAW. The EAW FD[1] was preceded by attempts to streamline judicial cooperation in criminal matters between Member States.[2] However, the terrorist attack on the World Trade Centre pushed the instrument to the top of the EU's policy priorities and led to the approval of the instruments in just a few months.[3] We have no way of knowing how long it would have taken for it to be adopted, what it would look like, and what would have been the fate of the EAW had 9/11 never happened. However, it is reasonable to state that the greater political resolve engendered by the terrorist threat contributed to the set-up of a mechanism that has drastically changed the landscape of inter-State cooperation within the EU. That was only the beginning of a story that would continue through to Brexit[4] and the authoritarian reforms of the judiciary in Poland,[5] and that would see the EAW as the catalyst of some fundamental developments of the EU as a legal order.

The well-known starting point is that the EAW was adopted as an expression of the principle of mutual recognition, identified as the cornerstone of judicial cooperation within the EU at the 1999 Tampere Council, and meant to prevent potential offenders from exploiting free movement for criminal purposes.[6] This objective is now reflected in Article 3(2) TEU, stipulating that the "Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to . . . the prevention and combating of crime".[7]

1. Council Framework Decision on the European Arrest Warrant and the surrender procedures between Member States, 2002/584/JHA, O.J. 2002, L 190/1.

2. Art. 66 of the 1990 Convention implementing the Schengen Agreement refers to the possibility for Member States to extradite their nationals without extradition formalities (provided the surrendered person agreed before a court and had been informed of their right to the extradition procedure). Also, the 1996 EU Convention on Extradition between Member States was aimed at limiting the application of the nationality ban.

3. Leaf, "Mutual recognition in European judicial cooperation: A step too far too soon? Case study – the European Arrest Warrant", 10 ELJ (2004), 210.

4. Case C-327/18 PPU, *RO*, EU:C:2018:733.

5. Case C-216/18 PPU, *LM*, EU:C:2018:586.

6. Tampere European Council, 15 and 16 Oct. 1999, Presidency Conclusion.

7. For a systemic reconstruction of the concept of the fight against impunity in EU law, and in relation to mutual recognition specifically, see Mitsilegas, "Conceptualising impunity in the law of the European Union" in Marin and Montaldo, *The Fight Against Impunity in EU Law* (Hart, 2020), pp. 21 et seq.

The introduction of the EAW met with concerns in terms of fundamental rights protection, and there was only limited certainty about what was going to change as compared to the previous system: cooperation was taken away from the executive and placed entirely in the hands of the judiciary, the principle of double criminality would no longer apply,[8] the prohibition to extradite a State's own nationals disappeared, tighter time limits for surrender were introduced to considerably shorten the overall procedures. The mandatory and optional grounds for refusal of execution were exhaustively listed in the FD; possible breaches of fundamental rights was not one of them.[9] Based on mutual recognition, the FD implies that an EAW issued by a judicial authority in Member State "A" and addressed to the Member State "B" against person "X", must be recognized by State "B" automatically *unless the specific grounds for refusal apply*. The change in substance has come with a change in vocabulary. In this context, we speak of "surrender" rather than "extradition", of "issuing" and "executing" rather than "requesting" and "requested" States, of "arrest warrant" rather than "extradition request".

Once handed over to national authorities, the EAW took on a life of its own and began interacting with 28 different constitutional systems. As it is an instrument of EU law, the national dimension(s) in turn unfolded against the background of the Union's complex legal architecture. The prominence of the EAW flows inevitably from the high stakes involved in a streamlined system of transnational law enforcement, with deprivation of liberty at its core. The ECJ even enhanced the relevance of the EAW, in that it used the FD to lay the foundation stones of the Union as a legal order way beyond the specific realm of judicial cooperation in criminal matters.

After the executing judicial authority (for ease of reading, the term "court" will also be used in this article) receives an EAW from the issuing authority, the former may raise doubts as to the interpretation of certain aspects of execution related to the circumstances of the specific case. For instance, Article 4(6) FD allows for refusal of execution if the person concerned is "staying in" the executing State. Supposing the question arose whether that exception would apply to someone that has lived in the executing Member State for one year. Asked to solve the legal dilemma, the ECJ "returns" its interpretation to the referring court, which implements the preliminary ruling and decides accordingly. Before or after the ECJ has been involved, the

8. The abolition of double criminality concerns, more specifically, a list of 32 areas of serious crime as per Art. 2(2) EAW FD. For other offences, States are still free to impose a verification of double criminality along the lines indicated by the ECJ in Case C-289/15, *Joszef Grundza*, EU:C:2017:4.

9. It is appropriate to emphasize here that – with slight variance – these are key features of all EU law instruments of judicial cooperation in criminal matters based on mutual recognition.

national authorities can – and, in some cases, must – liaise with each other to exchange information pursuant to the procedures laid down in the EAW FD.[10]

Dialogue through the preliminary ruling mechanism occurs in all areas of EU law. However, the dynamic nature of the EAW as a measure built around institutional interaction makes that dialogue the backbone of the FD. In such a judicial saga based on triangular cooperation – involving the issuing and executing courts and the ECJ – the answer of the Court is characterized by a two-tier (at least) legal analysis. On the one hand, there is the interpretation given to a specific provision or concept constituting a cog in the EAW mechanism. On the other hand, that reply is placed in a wider context where fundamental rights and general principles develop too. Thus, "staying in" under Article 4(6) EAW FD is defined with the rehabilitative function of penalties in mind.[11] "Deprivation of liberty" under Article 26 FD is addressed in light of the principle of legality and the right to liberty as stated in Article 49 and 6 of the EU Charter of Fundamental Rights (CFREU), respectively.[12]

While some principles do appear more regularly than others, there is one unifying factor that links the judgments issued by the ECJ, and that is the principle of mutual trust. Referred to in the preamble of the EAW as the basis of the mechanism,[13] mutual trust was mentioned in the very first ruling on the EAW and has since become the centrepiece of the mechanism.[14] What is more, it has forcefully ascended to the status of general principle of EU law. Rooted in the principles of equality between Member States and sincere cooperation,[15] coupled with solidarity,[16] geared towards effectiveness,[17] mutual trust in the EAW framework amounts to the rebuttable presumption that Member States comply with EU law and specifically fundamental rights.[18] The implication is that Member States may not demand a higher level

10. The legal basis for this cooperation is primarily Art. 15 EAW FD.

11. See, *inter alia*, Case C-66/08, *Szymon Kozłowski*, EU:C:2008:437; Case C-123/08, *Dominic Wolzenburg*, EU:C:2009:616; Case C-42/11, *João Pedro Lopes Da Silva Jorge*, EU:C:2012:517.

12. Case C-294/16 PPU, *JZ* v. *Prokuratura Rejonowa Łódź – Śródmieście*, EU:C:2016:610.

13. EAW FD, Recital 10: "… a high level of confidence between Member States".

14. Case C-303/05, *Advocaten voor de Wereld VZW* v. *Leden van de Ministerraad*, EU:C:2007:261, para 57.

15. Art. 4(3) TEU. See Fichera, "Mutual trust in European criminal law", *University of Edinburgh School of Law Working Paper Series* (2009/10), p. 12; Lenaerts, "La vie après l'avis: Exploring the principle of mutual (yet not blind) trust", 54 CML Rev. (2017), 805–840.

16. Case C-303/05, *Advocaten voor de Wereld VZW*, para 57.

17. Maiani and Migliorini, "One principle to rule them all? Anatomy of mutual trust in the law of the Area of Freedom, Security and Justice", 57 CML Rev. (2020), 7–44.

18. For a recent and broader taxonomy of the areas where the challenges of trust will emerge more prominently in the future, see Mitsilegas, "Trust", 21 GLJ (2020), 69.

of national protection of fundamental rights from another Member State than that provided by EU law; nor check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU, save in exceptional circumstances.[19]

The presumption is justified by the argument that States' adherence to the values listed in Article 2 TEU flows directly from their status of EU Member State.[20] As far as the EAW is concerned, the presumption can be rebutted provided that a two-step test devised by the ECJ is met. The executing court must refrain from executing the warrant where there is material indicating: systemic deficiencies in the issuing State concerning the protection of a fundamental right directly connected to Article 2 TEU; and, the risk that those deficiencies will affect the person concerned in the specific case.[21] The dialogue between the authorities of the States involved is key to this evidence-gathering process.[22]

This understanding of the *exceptional circumstances* doctrine as a two-step test has been developed by the ECJ in the specific context of the EAW. Here, the rebuttal of the presumption of mutual trust serves to refuse execution of the warrant on the basis of possible fundamental rights violations in the issuing State.[23] Therefore, the "*exceptional circumstances* doctrine" and "fundamental rights exception" in the EAW can be used interchangeably, as the law stands at present. However, such a test is an expression of the broader case law on the rebuttal of the presumption of mutual trust (at least, in the law of the Area of Freedom, Security and Justice). It is in the interpretation of the Dublin Regulation that the ECJ allowed, for the first time, a fundamental rights exception to a mutual trust-based mechanism of inter-State transfer of persons. In *N.S.*, the ECJ found that an absolute presumption of mutual trust is incompatible with EU law. Therefore, an asylum seeker should not be transferred to the Member State identified as responsible for the examination of the asylum claim according to the criteria laid down in the Dublin Regulation, if the systemic deficiencies of asylum procedures and reception

19. Opinion 2/13, *Accession ECHR*, EU:C:2014:2454, paras. 191–192.

20. Case C-216/18 PPU, *LM*, para 35.

21. Joined Cases C-404 & 659/15 PPU, *Aranyosi and Căldăraru*, EU:C:2016:198, para 104; Case C-216/18 PPU, *LM*, para 79.

22. "Evidence" is here used in a technical way. It refers to the material indicating the risk of fundamental rights breach, rather than the evidence supporting the charge or judgment at the basis of the EAW. "Evidence" is the term used by the Court as well, when referring to the information exchanged under Art. 15 EAW FD. See Case C-367/16, *Dawid Piotrowski*, EU:C:2018:27, paras. 60–61.

23. One may imagine that the two-step test might apply to judicial cooperation in criminal matters more broadly.

conditions in that State expose the person to the real risk of inhumane treatment.[24]

The ECJ introduced a fundamental rights exception into the EAW system for the first time in *Aranyosi and Căldăraru*.[25] The *exceptional circumstances* doctrine has since then been refined by the ECJ. The two main arenas involved so far have been the prohibition of inhumane and degrading treatment[26] and the right to an independent tribunal.[27] That case law has been triggered by the deplorable detention conditions in some Member States[28] and the authoritarian reforms of the judiciary perpetrated in Poland by the national government. This introductory sketch brings to the fore some key features of the EAW mechanism.

Firstly, the EAW is a system of judicial cooperation in criminal matters based on automaticity: recognition is the rule, with very little room for exceptions. That automaticity is built on mutual trust, understood in this context as the presumption of fundamental rights compliance by Member States. The presumption of compliance applies because the status of EU Member State entails adherence to the EU values listed in Article 2 TEU. As a further corollary, the system of exceptions to execution constitutes a defining feature of a mechanism based on automaticity.

Secondly, the definition of the EAW system as a form of judicial cooperation has significant legal implications. Since it constitutes a

24. Joined Cases C-411 & 493/10, *N. S.* v. *Secretary of State for the Home Department and M. E. and others* v. *Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, EU:C:2011:865, paras. 105–108.

25. Although the ECJ has not applied the *exceptional circumstances* doctrine to asylum and criminal law cooperation in exactly the same way, there are similarities and cross-references between its case law in the two areas. *Aranyosi and Căldăraru* is referred to in Case C-578/16 PPU, *C.K. and others*, EU:C:2017:127, paras. 59 and 75. There, the Court further clarified that the prohibition of transfer of an asylum seeker may apply even in the absence of systemic deficiencies in the State responsible, where there is a real risk that the transfer will lead to a breach of the prohibition of inhumane treatment.

26. Art. 4 CFREU. See Joined Cases C-404 & 659/15 PPU, *Aranyosi and Căldăraru*; Case C-220/18 PPU, *ML*, EU:C:2018:589; Case C-128/18, *Dumitru-Tudor Dorobantu*, EU:C:2019:857.

27. Art. 47 CFREU. See Case C-216/18 PPU, *LM*; Joined Cases C-354 & 412/20 PPU, *L. and P.*, EU:C:2020:1033.

28. The questions referred to the ECJ concerned detention conditions in Hungary and Romania. Poor standards in facilities of deprivation of liberty are widespread across Europe and certainly not limited to those two countries, as found by the European Court of Human Rights (ECtHR) in judgments concerning several Member States: ECtHR, *J.M.B. and others* v. *France*, Appl. No. 9671/15, judgment of 30 Jan. 2020; ECtHR, *Clasens* v. *Belgium*, Appl. No. 26564/16, judgment of 20 May 2019; ECtHR, *Petrescu* v. *Portugal*, Appl. No. 23190/17, judgment of 3 Dec. 2019; ECtHR, *Cirino and Renne* v. *Italy*, Appl. Nos. 2539/13 and 4705/13, judgment of 20 Oct. 2017; ECtHR, *Muršić* v. *Croatia*, Appl. No. 7334/13, judgment of 20 Oct. 2016; ECtHR, *Nikitin and others* v. *Estonia*, Appl. Nos. 23226/16 et al., judgment of 29 Jan. 2019.

mechanism of inter-State surrender of (alleged or "certified") offenders, certain specific safeguards play a particularly prominent role (such as, most obviously, those related to the treatment of detainees). The purely judicial nature of the cooperation places judicial independence right at the centre of the stage as an essential precondition for the healthy functioning of the EAW. Independence is a cornerstone of the system of EU judicial protection and of the rule of law, and lies at the very heart of Article 2 TEU.[29] A Member State's commitment to judicial independence is directly related to that State's respect of the EU values. This impacts on the credibility of presuming that State to be compliant with fundamental rights, which in turn is essential to the operation of the EAW. The systemic relevance of judicial independence to the EAW is twofold. First, all EAW procedures – from issuance through to execution – must be carried out under independent judicial oversight.[30] Second, independence must be guaranteed in the issuing State post-surrender. According to the *exceptional circumstances* doctrine, a real risk that the person will be denied a right to an independent tribunal is a reason not to execute the EAW.

Independence leads us to a third – closely related but broader – point concerning the role of national courts and the cooperative nature of the EAW. The triangular dynamic between the ECJ and the national authorities in the EAW framework has many expressions, notably when it comes to the possibility to refuse execution.[31] The most visible example is the exchange of information between the executing and the issuing authorities, with a view to assessing the existence of a real risk to the person's fundamental rights. The systemic and "local" situation in the issuing State, as well as the proper transmission of information to the executing authorities, are both relevant. The executing authority has a pivotal role too, that of being proactive in terms of evidence and information-gathering, raising questions to the ECJ, implementing the preliminary rulings and the *exceptional circumstances* doctrine.

In that context, things can go wrong in different ways through the fault of either or both national authorities. The practice of national courts and the cases that reached the ECJ show that possible scenarios in this regard include:

29. Case C-619/18, *Commission* v. *Poland (Independence of the Supreme Court)*, EU:C:2019:531, para 58.

30. Case C-168/13 PPU, *Jeremy F* v. *Premier ministre*, EU:C:2013:358, para 46.

31. This cooperation is not in contradiction with the automaticity of the system, since it exists either in a physical form, e.g. clarifying details of the EAW, or as exception to the rule embodied by the *exceptional circumstances* doctrine.

breach of the duties of cooperation between national authorities;[32] failure to refer a question to the ECJ;[33] incorrect application of or express disregard for EU law, including preliminary rulings.[34] The ECJ must provide a useful response concerning the interpretation of EU law within the limits of its jurisdiction as established by the Treaties. National authorities – courts and tribunals specifically – have a legal obligation to be collaborative with each other and with the Court. That cooperation provides the foundation for the application of the *exceptional circumstances* doctrine, which is an essential component of the sound functioning of mutual trust.

Against that background, mutual trust alone emerges as a fragile basis for the EAW, if not supported by sincere cooperation as per the threefold obligation laid down in Article 4(3) TEU: mutual assistance (between the EU and the States) in carrying out their respective tasks; (for the States specifically) taking the appropriate measures to fulfil their obligation under EU law; facilitating the attainment of the Union's objectives and refraining from measures which could jeopardize that. We also see very clearly that judicial independence is an essential precondition for the joint workability of sincere cooperation and mutual trust. To stick to the example of the *exceptional circumstances* doctrine: what is the credibility of a system whose essential functioning is based on courts providing reliable information about their independence, if they belong to a Member State where the systemic independence of the judiciary itself has been blatantly compromised?[35] Rhetorical as it may sound, it is argued that the question has no clear-cut answer.

32. As detailed below, the ECJ found in Case C-220/18 PPU, *ML*, that the 78 questions posed by the executing court to the issuing authority, because of their number and content in relation to the facts of the case, were not compatible with the duty of sincere cooperation under Art. 4(3) TEU.

33. See the national follow-up to *LM* in *The Minister for Justice and Equality* v. *Celmer* (No 5) [2018] IEHC 639, 19 Nov. 2018, and the appeal proceedings in *The Minister for Justice and Equality* v. *Artur Celmer* [2019] IESC 80, 12 Nov. 2019. It is argued below that the Irish courts, when implementing the preliminary ruling, could – at the very least and considering the importance of the case – have referred a further question to the ECJ to clarify the scope of application of the two-step test.

34. The Portuguese Supreme Court ignored the ECJ's ruling in Case C-327/18 PPU, *RO*, according to which Member States should execute EAWs issued by the UK until the latter has left the EU unless there is concrete evidence showing there are reasons to challenge the presumption of mutual trust. See judgment 120/17.2YREVR.S1, 14 Feb. 2019, and the report of the case in FIDE XXIX Congress Publication, Vol 1, 2020, pp. 44 et seq.

35. For policy proposals to address this and related issues, see Bárd and van Ballegooij, "The effect of CJEU case law concerning the rule of law and mutual trust on national systems" in Mitsilegas, Mancano and di Martino, *The Court of Justice and European Criminal Law. Leading Cases in a Contextual Analysis* (Hart, 2019), pp. 455–467.

The present article investigates these interconnected strands in a systemic fashion. It argues that the EAW cannot work properly if mutual trust is not supported by sincere cooperation, with judicial independence being a necessary condition for that to happen. The argument develops along the following lines. Section 2 introduces the key features of the EAW FD. Section 3 focuses on the grounds for refusal expressly laid down in the text of the FD. Section 4 unpacks the *exceptional circumstances* doctrine, while Section 5 addresses reasons of invalidity of the EAW. In the framework of the complex relationship between fundamental values and objectives of the Union, the conclusions in Section 6 reveal the existence of a *fil rouge* drawing together the importance of sincere cooperation for strengthening mutual trust, the role of national courts in upholding the rule of law, and the significance of judicial independence to the proper functioning of the EAW.

2. The European Arrest Warrant Framework Decision

The EAW is defined in Article 1(1) of the FD as a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution, or executing a custodial sentence or detention order. While Member States shall execute an EAW on the basis of the principle of mutual recognition, the FD shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU.[36]

The machinery of the EAW is organized around a delicate balance of power between the issuing and executing States. The issuing and executing judicial authorities must be the authorities competent to issue and execute an EAW by virtue of the law of those States.[37] An EAW is issued in relation to criminal offences as they are defined and punished by the law of the issuing State.[38] It is the law of the executing State, however, that often determines the conditions on which an EAW can be refused.[39] Furthermore, it is shown below that the practice has increasingly turned the authorities of the executing State into bastions of fundamental rights. The EAW can be validly issued where a series of conditions are met[40] and as long as certain information has been included in

36. EAW FD, Art. 1(2) and (3).
37. Ibid., Art. 6.
38. Ibid., Art. 2(1) and (2).
39. See e.g. ibid., Arts. 4(4) and (7)(a).
40. This is to do, *inter alia*, with the minimum level of punishment that could be imposed for the offence underlying the EAW according to the law of the issuing State as per Art. 2(1) EAW FD.

the warrant.[41] The issuing and executing authorities must exchange information promptly and as a matter of urgency if the information provided by the issuing State does not enable the executing authority to make a decision about surrender.[42]

The identification and interpretation of the reasons for refusal has been the main battleground for the persons subject to EAWs, national authorities and the ECJ. If the formative years of the EAW have been characterized by a strong emphasis on automaticity and effectiveness of cooperation, as time went by the approach of the Court and the EU legislature has become more nuanced. We have seen the emergence of an articulated system of three main grounds for refusal. First, there are the mandatory and optional grounds enumerated in Articles 3 and 4 EAW FD. Second, there is the obligation not to execute the warrant when there is a risk of fundamental rights violation in the issuing State. Third, the EAW must not be executed if it is invalid. Certain key features of this law are worth highlighting. Much of the framework presented below is based on the exegetic endeavour of the ECJ, as is mostly evidenced by the principle of mutual trust. The evolution of that principle has gone hand in hand with another fundamental element of this rich case law, which is the importance of dialogue between the national actors in the cooperation throughout recognition and execution. Particularly prompted by the rule of law backsliding pursued by the Polish Government, the development of the concept of, and role for, judicial independence has proved vital to the dynamic relationship between mutual trust and cooperation. In the next three sections, all those factors play out, often against the background of the relationship between fundamental values and objectives of the EU – more specifically, the respect for fundamental rights and the aim to avoid impunity.

3. Mandatory and optional grounds for refusal

The FD provides a list of cases when the executing judicial authority *shall* (mandatory grounds) or *may* (optional grounds) refuse execution of the EAW. Apart from the exceptions working as coordination mechanisms, based on territorial jurisdiction,[43] the grounds for refusal and conditionality are clearly rooted in specific fundamental rights, such as the right to a fair trial,[44] the

41. Ibid., Art. 8.
42. Ibid., Art. 15.
43. Ibid., Art. 4(7). These include cases where the verification of double criminality is still allowed as per Art. 4(1) EAW FD.
44. Ibid., Arts. 4(a) and 5(1).

rights of the child,[45] the principle of ne bis in idem,[46] the rehabilitative function[47] and the proportionality[48] of criminal penalties. These are framed as either mandatory or optional grounds for refusal, or conditions of execution depending on the degree to which they outweigh the importance of surrender. However, they are very much concerned with "accidental" fundamental rights violation – possible bumps along the road caused by different States' laws, operational and specific aspects, or the nature of cooperation itself.[49] They do not originate from the fear that the issuing State might be caught in systemic violations, or might be affected by structural problems capable of undermining the EAW mechanism. In this sense, these exceptions are in line with and reinforce the presumptive nature of mutual trust. That presumptive component is married to the importance that the national authorities maintain a collaborative disposition. This is particularly visible when it comes to optional grounds for refusal, as the discretion enjoyed by a State's court must be used consistently with their duties of cooperation. With a view to increasing the chances of reintegration, Article 4(6) EAW FD allows the executing court to refuse surrender where the person is a "national" or "resident" of, or is "staying in", the executing State provided that the latter State undertakes to execute the sentence. However, EU law precludes national legislation that does not authorize surrender of a foreign national who possesses a permanent residence permit, while the executing court is merely required to inform the issuing State of their willingness to take over the enforcement but at that moment has not actually done so, and, moreover, the refusal to surrender is not challengeable in the event that execution of the sentence subsequently proves to be impossible.[50]

The ECJ has used the mandatory and optional grounds for refusal to develop the concept of mutual trust and the functioning of the EAW. As a basic "rule of thumb", the Court has consistently stressed the importance of mutual

45. Ibid., Art. 3(3).

46. Ibid., Arts. 3(1) and (2), 4(2), (3), (4) and (5). See Case C-261/09, *Gaetano Mantello*, EU:C:2010:683; Case C-268/17, *AY*, EU:C:2018:602.

47. Arts. 4(6) and 5(3) EAW FD. The principle of rehabilitation of penalties is widely considered a principle shared by the Member States. See the European Parliament Resolution on respect for human rights in the European Union (1997), O.J. 1999, C 98/279, where it is stated that custodial sentences must have a corrective and rehabilitative function (para 78). At Member State level, see e.g. Art. 2 of the German Law on the execution of sentences of imprisonment (*Strafvollzugsgesetz*). With regard to the Spanish and Italian constitutions, see Art. 25(2) and Art. 27(3) respectively.

48. Art. 5(2) EAW FD.

49. These can be the age requirement for being held criminally liable, the different options given to the executing authority to avoid double jeopardy, the extreme case of life imprisonment, or the possibility to refuse execution because the person would have better chances of reintegration in the executing State.

50. Case C-579/15, *Daniel Adam Popławski*, EU:C:2017:503, para 24.

trust as to the fact that each Member State accepts the application of the criminal law in force in the other Member States, even though the implementation of its own national law might produce a different outcome.[51] The underlying assumption is that States are all capable of providing equivalent and effective protection of the fundamental rights recognized at EU level.[52] The exceptions to, and conditions of, execution, express that view of mutual trust in two, complementary, fashions. On the one hand, the executing court may refuse execution where they have already decided not to prosecute the offence on which the EAW is based,[53] with the issuing State having to accept that the case has already been addressed and "closed" by another State authority. On the other hand, the FD provides that an EAW must be refused if the person concerned may not, owing to his age, be held criminally responsible under the law of the executing State for the acts on which the EAW is based. The principle of mutual trust implies that the executing court "must simply verify whether the person concerned has reached the minimum age required to be regarded as criminally responsible in the executing State", without carrying out an individual assessment of circumstances, as they would do according to their national law.[54]

The exceptions embody mutual trust, but their implementation and proper functioning is built on sincere cooperation. Depending on the circumstances, cooperation can require that the executing State either self-restrains, or actively engages with the issuing State. Furthermore, the cooperation on which those exceptions are based is largely and ultimately driven by the achievement of the objectives of the FD (alone, or in combination with other goals such as social reintegration). Thus, the creation of pockets of impunity across the Union is prevented, primarily through ensuring a swift surrender procedure.[55] This is consistent with the nature of the exceptions, since they are mostly premised on the fact that either justice is being done, has already been done, or will be done, or that a public interest (e.g. minor age of the person) outweighs prosecution.

Building on that approach, the conversation about refusing execution and mutual trust has become particularly difficult when Member States have tried to use those exceptions as a bridge towards uncharted territory: that is, introducing a broader and unwritten ground for refusal based on possible

51. See Case C-367/16, *Dawid Piotrowski*, EU:C:2018:27, para 52. Such understanding of mutual trust evokes the early days of the principle in the context of the AFSJ, where trust was used to develop transnational *ne bis in idem* under Art. 54 CISA. See Joined Cases C-187 & 385/01, *Hüseyin Gözütok and Klaus Brügge*, EU:C:2003:87, para 33.

52. Case C-168/13 PPU, *Jeremy F.*, paras. 49 and 50.

53. EAW FD, Art. 4(3).

54. Case C-367/16, *Piotrowski*, para 62.

55. EAW FD, Recital 5.

fundamental rights violations. For instance, Article 4a(1) allows refusal when the judgment on which the EAW is based was issued *in absentia*. However, the FD also lists very specific cases where the EAW must be executed nonetheless, because it can be presumed that fundamental rights were respected even though the person did not attend the trial.

In *Melloni*, the ECJ famously found that the executing court cannot make the surrender of a person convicted *in absentia* conditional on the conviction being open to review in the issuing State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed constitutionally by the executing State. Allowing an exception to execution not provided in the FD would cast doubt "on the uniformity of the standard of protection of fundamental rights as defined in [the FD], would undermine the principles of mutual trust . . . and would, therefore, compromise the efficacy of [the FD]".[56] Mutual trust is here understood as a mono-dimensional vector of transnational law enforcement efficiency; over time, however, the approach of the Court has become more nuanced and sophisticated.

Years later, asked about whether the *in absentia* exception would also cover appeal proceedings or the execution or application of a custodial sentence, the Court forcefully stated a series of principles governing the operation of the EAW and mutual trust. Firstly, the principles of mutual trust – and recognition, on which the FD is based – must not in any way undermine fundamental rights.[57] Secondly, Member States and *their judicial authorities* are not exempt from the obligation to respect fundamental rights and fundamental legal principles (emphasis added). Thirdly, compliance with that obligation reinforces the high level of trust that national legal systems are all capable of providing equivalent and effective protection of the fundamental rights recognized at EU level. Fourthly, the issuing and executing authorities must make full use of the FD to cooperate effectively and, on that basis, to foster mutual trust. This includes the exchange of information under Article 15 FD.[58]

The facts of the cases in *Melloni* and the second group of judgments are different. The former concerned, *inter alia*, the possibility for the executing court to apply its State's higher fundamental right standards and refuse execution. The latter revolved around the interpretation of the concept of the "trial resulting in the decision", at which the person was not present. That variance notwithstanding, the evolution in the approach to mutual trust and the dynamic underlying the EAW is apparent. The presumptive element of trust is more carefully balanced against the credibility of that presumption, which

56. Case C-399/11, *Stefano Melloni* v. *Ministerio Fiscal*, EU:C:2013:107, para 63.
57. Case C-270/17 PPU, *Openbaar Ministerie* v. *Tadas Tupikas*, EU:C:2017:628, para 59.
58. Case C-571/17 PPU, *Samet Ardic*, EU:C:2017:1026, paras. 89–91.

comes with actual and verifiable compliance. The judicial authorities play a major role in preserving the credibility; their respect for fundamental rights is a precondition for the stability of the whole edifice, and for the cooperation that must support mutual trust.

Granted, a fundamental rights-oriented interpretation of the FD should not undermine the effectiveness of judicial cooperation.[59] However, there is a tipping point where that reconciliation might no longer be pursued. In fact, though stated in the context of Article 4a(1), the principles set out by the Court speak louder than the limited and specific disruptions envisaged by that exception. Those principles have a systemic "flavour", and seem concerned with the scenario where a Member State's constitutional system is affected by structural defects. What to do when that happens? Some answers are in the next section, which focuses on the *exceptional circumstances* doctrine.

4. The *exceptional circumstances* doctrine

After some reluctance,[60] the ECJ has established the conditions on which the presumption of mutual trust must be rebutted, and the EAW not executed, on grounds of possible fundamental rights violations. In this context, the Court relied on Article 1(3) FD to develop the *exceptional circumstances* doctrine with regard to two fundamental rights (so far), i.e. the absolute prohibition of degrading treatment and the right to an independent tribunal. The general test consists of a two-step assessment to be carried out by the executing authority. Firstly, it must be verified that systemic deficiencies exist, which affect the right in question in the issuing State.[61] Secondly, it must be ascertained specifically and precisely whether those deficiencies will pose a real risk to the right of the person concerned in the specific case. The executing court must, pursuant to Article 15(2) EAW FD, request that the issuing authority provide any supplementary information that it considers necessary for assessing whether there is such a risk.[62] The decision on the surrender must be postponed until the supplementary information is obtained. Meanwhile, the detention of the person can be extended provided that that measure is proportionate, with regard being had to the presumption of innocence and their right to liberty.[63] If, after an examination of the available information –

59. Case C-270/17 PPU, *Tupikas*, para 63.
60. Case C-396/11, *Ciprian Vasile Radu*, EU:C:2013:39.
61. The assessment should be based on objective, reliable, specific, and properly updated material. Joined Cases C-404 & 659/15 PPU, *Aranyosi and Căldăraru*, para 89.
62. Ibid., para 97; Case C-216/18 PPU, *LM*, paras. 76.
63. Joined Cases C-404 & 659/15 PPU, *Aranyosi and Căldăraru*, paras. 98–101.

including that provided by the issuing State – the real risk cannot be discounted, the executing authority must refrain from executing the EAW.[64]

The *exceptional circumstances* doctrine is built on a series of interdependent components: modus operandi of the test; standard of proof; content of the right under attack; evidence-gathering process via Article 15 FD; and implementation of the test at national level. These constituent elements reflect the legal set-up that supports the operation of the EAW, a mechanism where judicial independence is a fundamental precondition for the joint operation of sincere cooperation and mutual trust.

4.1. *The concept of judicial independence*

The definition of judicial independence is particularly important to assess the functioning of the doctrine. Article 2 TEU and the rule of law are the cornerstones of the ECJ's approach to judicial independence and are identified as the sources of salient provisions.[65] Firstly, there is the right to a fair trial and to an effective remedy as per Article 47 CFREU. Secondly, Article 19 TEU requires that national courts and the ECJ ensure the full application of EU law in all Member States and judicial protection of the rights of individuals under that law.[66] The right to an independent tribunal is key to the protection offered jointly by Article 47 CFREU and Article 19 TEU; it forms part of the essence of the right to a fair trial, and is vital to the effective judicial review of any decision or measure relating to the application of EU law.[67]

The Court sees independence as consisting of an internal and external dimension. External independence presupposes autonomy of judicial functions

> "without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions".[68]

64. Ibid., para 101.
65. Case C-216/18 PPU, *LM*, para 35.
66. Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117, paras. 31–41. Some scholars see Art. 19 TEU as both a specific expression of the rule of law and a *lex specialis* to the principle of sincere cooperation under Art. 4(3) TEU. Groussot and Martinico, "Mutual trust, the rule of law and the Charter: A new age of judicial activism", *EU Law Live*, 25 Jan. 2020, available at <eulawlive.com/long-read-mutual-trust-the-rule-of-law-and-the-charter-a-new-age-for-judicial-activism-by-xavier-grousot-and-giuseppe-martinico/> (all websites last visited 25 Feb. 2021).
67. Case C-216/18 PPU, *LM*, paras. 49–51.
68. Case C-619/18, *Commission* v. *Poland (Independence of the Supreme Court)*, para 72.

This requires certain guarantees concerning, especially, protection against removal from office, remuneration commensurate with the importance of the functions, and a disciplinary regime not prone to being used as a system of political control.[69] Internal independence is linked to impartiality and seeks to ensure equal distance from the parties to the proceedings, which comes with objectivity and the absence of any interest in the outcome apart from the strict application of the rule of law.[70] These rules are meant to preclude any influence – direct or indirect – which is liable to have an effect on the decision of the judges concerned.[71] Appearances matter too: "What is at stake is the confidence which the courts in a democratic society must inspire in the public".[72] In other words, "justice must not only be done, it must also be seen to be done".[73] On that basis, the judicial dialogue via (mostly) Article 267 TFEU between Polish judges and the ECJ has led the latter to upholding judicial independence against the authoritarian reforms introduced by the current Polish Government. Over the last couple of years, the Court has declared the unlawfulness of the exclusive jurisdiction on matters of EU law conferred upon the Disciplinary Chamber of the Supreme Court;[74] the different retirement age for men and women for judges and public prosecutors, and the power granted to the Minister for Justice to decide whether to authorize judges of the ordinary courts to continue to carry out their duties beyond the new retirement age of those judges;[75] the retroactive application of the lowering of the retirement age of the judges of the Supreme Court, and the discretion given to the President of the Republic to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age.[76]

While the ECJ's approach is largely reliant on the understanding of judicial independence developed by the European Court of Human Rights (ECtHR), there is some difference between the two that is worth highlighting. In general, it is important to remember that the guarantees of independence are required of a "tribunal" in the context of the right to a fair trial, but also of a "judge or other officer authorized by law to exercise judicial power" in relation to

69. Case C-64/16, *Juízes Portugueses*, para 45; Case C-506/04, *Graham J. Wilson* v. *Ordre des avocats du barreau de Luxembourg*, EU:C:2006:587, para 51.

70. Case C-506/04, *Wilson*, para 52.

71. Joined Cases C-585, 624 & 625/18, *A.K.* v. *Krajowa Rada Sądownictwa, CP*, *DO* v. *Sąd Najwyższy*, EU:C:2019:982, para 125.

72. Ibid., para 128. Here, the ECJ quotes verbatim the ECtHR. Among many, see ECtHR, *Morice* v. *France* [GC], Appl. No. 29369/10, judgment of 24 April 2015, para 78.

73. ECtHR, *De Cubber* v. *Belgium*, Appl. No. 9186/80, judgment of 26 Oct.1984, para 26; ECtHR, *Micallef* v. *Malta* [GC], Appl. No. 17056/06, judgment of 15 Oct. 2009, para 98.

74. Joined Cases C-585, 624 & 625/18, *A. K., CP and DO*.

75. Case C-192/18, *Commission* v. *Poland*, EU:C:2019:924.

76. Case C-619/18, *Commission* v. *Poland (Independence of the Supreme Court)*.

habeas corpus.[77] The ECJ follows the ECtHR, as it regards impartiality as subjective and objective.[78] The ECtHR, however, sees *internal independence* as freedom from within the judiciary,[79] whereas *external independence* as concerning external pressure – from e.g. the executive.[80] Is this divergence purely terminological, or can there be practical consequences attached to it? The Court seems to treat independence and impartiality as cumulative parts of one single test. Both the ECJ and the ECtHR hold that independence and objective impartiality "are closely linked". The former, however, finds that this generally means they require joint examination,[81] whereas the latter states that they *may* require joint examination, *depending on the circumstances* (emphasis added).[82] If those subtests are indeed cumulative, who would benefit in the context of the *exceptional circumstances* doctrine? The answer depends on the party bearing the burden of proof. If the burden is on the court or tribunal in the spotlight, that would make it harder for them to satisfy the relevant legal requirements – a test which is easier for the court to fail gives an advantage to the defendant. The opposite would be true if the burden were on the person subject to the EAW, and both parts of the test had to be met to convince the executing court not to execute the warrant.

A look at the other components of the *exceptional circumstances* doctrine helps find a response to this legal question with significant systemic implications.

4.2. *The standard of proof*

The standard of proof established by the *exceptional circumstances* doctrine is the *real risk*. This is a flexible concept, and we cannot pinpoint it on a spectrum of probability as we would do a location on a map. Through such a test, however, the executing court is required to carry out a probability

77. Art. 5(3) ECHR. ECtHR, *McKay* v. *United Kingdom* [GC], Appl. No. 543/03, judgment of 3 Oct. 2006, para 35.

78. Subjective impartiality is related to the personal conviction or interest of a judge in a case, whereas objective impartiality aims to determine whether the judge offered sufficient guarantees to exclude any legitimate doubt in this respect and whether there are ascertainable facts which may raise doubts as to their impartiality. See Appl. No. 9186/80, *Cubber*, cited *supra* note 73, para 25; ECtHR, *Grieves* v. *the United Kingdom* [GC], Appl. No. 57067/00, judgment of 16 Dec. 2003, para 69; Appl. No. 29369/10, *Morice*, cited *supra* note 72, para 76.

79. ECtHR, *Parlov-Tkalčić* v. *Croatia*, Appl. No. 24810/06, judgment of 22 Dec. 2009, para 86.

80. ECtHR, *Henryk Urban and Ryszard Urban* v. *Poland*, Appl. No. 23614/08, judgment of 30 Nov. 2010, para 45.

81. Joined Cases C-585, 624 & 625/18, *A. K., CP and DO*, para 129.

82. ECtHR, *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], App. Nos. 55391/13, 57728/13 and 74041/13, judgment of 6 Nov. 2018, para 150.

assessment: they must ascertain the existence of a situation of danger that is not purely hypothetical and is based on materials portraying the violation as a concrete possibility. With that in mind, it is submitted that a particularly strict interpretation of the standard of "real risk" – an interpretation that might take it closer to "near certainty" – would not do justice to the nature of the test itself, and should therefore be avoided. This consideration will prove particularly important in the context of implementation at national level.

The *real risk* being the general standard of proof, the test unfolds with a slightly different wording depending on the right at stake – at least, as the law stands at present. In the case of inhumane treatment, the deficiencies may be "systemic or generalized, *or* . . . may affect certain groups of people, *or* . . . certain place of detention" (emphasis added).[83] When the real risk exists that surrender to the issuing State will result in the breach of an absolute prohibition, the absence of systemic deficiencies does not prevent the executing court from refusing to proceed.[84] Furthermore, if the risk cannot be discounted *within a reasonable time*, the executing State must decide whether the surrender procedure should be brought to an end.[85] When making that decision, the absolute nature of the prohibition means that the existence of a real risk cannot be weighed against considerations related to the efficacy of judicial cooperation.[86]

As stated in *LM* first, when it comes to the right to an independent tribunal, the assessment must first revolve around the operation of the system of justice in the issuing State.[87] Second, there must be precise and specific elements showing that systemic deficiencies are *liable to* have an impact at the level of the State's courts with jurisdiction over the proceedings *and* there must be substantial grounds for believing that the person will run a real risk, having regard to their personal situation, as well as to the nature of the offence for which they are being prosecuted and the factual context that form the basis of the EAW.

These steps reflect the independence plus impartiality approach of the ECJ, in that they effectively require the defendant to prove both aspects to halt surrender. In the more recent *L. and P.* judgment, following questions raised by the District Court of Amsterdam, it was found that systemic deficiencies concerning the independence of a State's judiciary, even if worsened over

83. Joined Cases C-404 & 659/15 PPU, *Aranyosi and Căldăraru*, para 104.

84. See, in this sense, Lenaerts, op. cit. *supra* note 15, 833. Or, as other authors put it, a single breach might in itself express systemic deficiencies because of its seriousness. See von Bogdandy, "Principles of a systemic deficiencies doctrine: How to protect checks and balances in the Member States", 57 CML Rev. (2020), 705–740, 718.

85. Joined Cases C-404 & 659/15 PPU, *Aranyosi and Căldăraru*, para 104.

86. Case C-128/18, *Dumitru-Tudor Dorobantu*, paras. 82–84.

87. Case C-216/18 PPU, *LM*, para 61.

time, do not automatically affect every decision issued by every court of that State.[88] The two-step test still stands; the examination involves an analysis of the information obtained on the basis of different criteria, and the steps cannot overlap one another.[89]

On the one hand, there is the ECJ's refusal to allow general deficiencies to suffice for not executing an EAW. This seems to be mostly shaped by three systemic concerns. First, an interpretation to the contrary would amount to a de facto suspension of the EAW, while the preamble of the EAW FD empowers only the European Council to do so.[90] Second, accepting that judges or courts of a Member State can no longer be considered independent *en masse* would deprive those courts and judges of the possibility to make use of the preliminary ruling mechanism, while precisely that mechanism has played a key role in relation to resisting the "reforms" of the Polish government. Third, it would entail a high risk of impunity of requested persons present in a territory other than that in which they allegedly committed an offence, thereby undermining a fundamental objective of the EAW and the EU more broadly.[91] On the other hand, and while aware of its institutional constraints, the Court emphasized that the finding that there has been an increase in systemic deficiencies must prompt the executing authority to exercise vigilance.[92] Furthermore, the ECJ found that statements by public authorities of the issuing State, which are liable to interfere with how an individual case is handled, must be taken into account when applying the two-step test.[93]

It is submitted that the threshold set by the test might not be insurmountable as may appear. Firstly, the precision and specificity of the materials must show that the systemic deficiencies are liable to affect the competent court of the issuing State. Different linguistic versions of the case law confirm that the exacting precision of the elements is softened by a milder predictive assessment; expressions are used that are semantically close to *liable to* (*puedan*, *susceptibles*, *geeignet*, *idonee*) and depict deficiencies as *capable of* affecting the independence of the court with jurisdiction. Secondly, the risk does not need to emerge cumulatively from the personal situation, the nature of the offence, and the factual context. These are, rather, some of the fields of investigation for the executing court. The second step leaves the executing authorities a certain degree of flexibility, which they can use in case of serious

88. Joined Cases C-354 & 412/20 PPU, *L. and P.*, para 40.
89. Ibid., para 56.
90. Recital 10 EAW FD refers to the Council, not the European Council, but the relevant provisions of the Treaty at the time clarify that it was the Council in its composition of Heads of State and Government.
91. Ibid., paras. 62–64.
92. Ibid., para 60.
93. Ibid., para 69.

and reliable concerns with regard to the fairness of the trial of the person subject to the EAW.

4.3. *Evidence gathering and sincere cooperation*

In that context, a key component of the *exceptional circumstances* doctrine is the evidence-gathering process via Article 15 EAW FD. Article 15 EAW FD must be used as a last resort[94] and consistently with the duty of sincere cooperation under Article 4(3) TEU.[95] That duty would be breached, for example, if the executing court were to ask questions that, due to their number and nature, jeopardized the timely completion of the EAW procedures within the deadlines laid down in the FD. This would result in a risk of impunity, which would in turn be incompatible with the objectives of the FD and Article 3(2) TEU.[96] If the issuing State provides reassurance that the person will not be exposed to a real risk of fundamental rights violations, the executing court must consider the legal weight to be attached to that reassurance. If it comes from a (non-judicial) authority of the issuing State (such as the Ministry of Justice), the executing authority may rely on that in the context of the overall assessment.[97] If reassurance is given by the issuing judicial authority, the executing judicial authority must rely on that assurance, save in exceptional circumstances where there are specific indications to the contrary.[98]

In the EAW mechanism, mutual trust underpins the functioning of the system and amounts to the rebuttable presumption of fundamental rights compliance. The *exceptional circumstances* doctrine is an integral part of that presumption: to define its operation and scope of application is to define – to an extent at least – the identity of the EAW. In turn, the doctrine and the EAW more broadly cannot operate properly without sincere cooperation.

In the Court's endeavour to preserve the constitutional fabric of the Union, sincere cooperation plays – more or less explicitly – a fundamental role. Sincere cooperation gears the actions of the Union and the States towards the fulfilment of their tasks, compliance with their obligations, and achievement of the objectives under EU law. Furthermore, that duty applies specifically to the Union institutions in relation to one another.[99]

The ECJ has been creative in interpreting its own jurisdiction over the national reforms of the judiciary in Poland. Its use of Article 19 TEU speaks very clearly to the Court's unwillingness to sit quietly and watch the rule of

94. Case C-220/18 PPU, *ML*, para 79.
95. Ibid., para 104.
96. Ibid., paras. 84–86.
97. Ibid., para 117.
98. Case C-128/18, *Dumitru-Tudor Dorobantu*, paras. 68–69.
99. Art. 13(2) TEU.

law being dismantled in an EU Member State. There are, nonetheless, legal limits to what the Court can do that may not be ignored. The exclusive prerogative of suspending the EAW towards a Member State is conferred by the FD on the European Council; granted, the conferral is contained in a non-legally binding recital. Should the Court introduce a de facto suspension, however, and allow the executing courts not to surrender on the basis of the systemic deficiencies only, that would raise clear issues of the ECJ's own compliance with its Treaty obligations and legitimacy *vis-à-vis* the Union institutions as well as the national courts, who have relied on Article 267 TFEU as a lifeline against the brazen attacks on their independence. It might be objected that the European Council has failed to act[100] on the suspension of the EAW in relation to Poland. The question arises as to whether the latter circumstance enables the ECJ to take that controversial step instead.

The understanding of the ECJ's own role bears further consequences related to sincere cooperation. This flows from the need to give an interpretation of EU law that can make systemic sense across the different threads of case law, and takes into account the different interests at stake. The threefold obligations inherent in the duty of sincere cooperation entail a balancing exercise, as exemplified by the objective of combating impunity. Avoiding impunity must not be used as a counter-balancing factor against the risk of inhumane treatment, when deciding about surrender. Nonetheless, that objective does orient – if not limit – the executing authority's action when implementing the two-step test and requesting additional information from the issuing State. As the most forceful expression of the principle of mutual trust, the EAW is the means to combat making use of the absence of internal frontiers for illicit purposes, and therefore to keep the borderless area sustainable. This is a fundamental objective of the Union as per Article 3(2) TEU, and a defining trait of its DNA as a polity. The finding that systemic deficiencies do not affect every decision from every court of the land implies, *inter alia*, that not every EAW is issued because of political pressure from the executive. The Court acknowledges that fighting impunity can and must give way, in some cases; it is also cognizant, though, that that objective may not be taken out of the equation altogether, but must live – as far as possible – with coping mechanisms such as the *exceptional circumstances* doctrine. In such a systemic assessment, the risk of impunity is invoked by the Court but what that danger actually entails or presupposes is far from clear. How do we define impunity, when the independence of the court meting out punishment might be seriously under siege? Though it might be objected that a specific question around impunity or the interpretation of Article 3(2) TEU more broadly has

100. "Failure to act" is used here in a broader sense, without necessarily implying that the European Council's inertia has already met the requirements set by Art. 265 TFEU.

not been submitted to the Court yet, it is argued that a risk of impunity would be avoided if, at the very least, one of the optional grounds for refusal under Article 4 EAW FD was applicable to the facts of the case brought before the ECJ.

Against that background, Article 15 FD and the Court's interpretation thereof enshrines the nexus between judicial independence, sincere cooperation and mutual trust underpinning the functioning of the EAW. On that basis, Article 15 FD is an important lever at the disposal of the executing authorities in the exercise of their duty of vigilance.[101] The fundamental question arises as to when cooperation from the issuing authority may no longer be considered sincere. Judicial independence constitutes a fundamental precondition to this framework. Without a reliable judicial interlocutor in the issuing State, the principle of mutual trust cannot work healthily and neither can the EAW. The fact that a State government has defiantly proceeded with their authoritarian plans, despite the ECJ's judgments pointing to their unlawfulness, undoubtedly undermines the credibility of its reassurance in the context of the Article 15 FD exchange. Would the same apply to reassurance given from a judicial authority of that State? The executing court must take into account the reassurance given unless there are specific indications to the contrary. Similarly to what was stated above (section 4.2), materials and indications (including those provided by the defendant) can be specific without necessarily having to prove untrustworthiness and risk of violation with absolute certainty. Reassurance given by the issuing judicial authority in a State where independence is under attack is, therefore, not the end of the story.

It is for the executing authorities to use the room for manoeuvre left by the *exceptional circumstances* doctrine which, it is once again forcefully submitted, requires a moderate level of risk. The next section addresses the last, essential, component of the fundamental rights exception, and considers the options at the disposal of the executing authority.

4.4. *Implementation at the level of the Member States*

It goes without saying that national courts are the backbone of a system of inter-State judicial cooperation. On the one hand, the executing court leads the evidence-gathering process, applies the test to the facts, and enjoys a certain

101. On the rights that at violation of the assurance might create for the person concerned, and on the compatibility of this approach with the ECtHR case law, see Caeiro, "Scenes from a marriage: Trust, distrust and (re)assurances in the execution of a European Arrest Warrant" in Carrera, Curtin, and Geddes (Eds.), *20 Years Anniversary of the Tampere Programme: Europeanisation Dynamics of the EU Area of Freedom, Security and Justice* (European University Institute, 2020), p. 239.

margin of appreciation in implementing the *exceptional circumstance* clause. On the other hand, the issuing State must provide information under Article 15(2) EAW FD and bears the burden of proof once the two steps of the test are met.

The Dublin High Court was the first one to apply the doctrine in relation to judicial independence, being the referring court in *LM*. The Dublin High Court considered that the situation at stake failed to meet the ECJ's test, but it did so – in the opinion of the present author – on very debatable legal grounds. Firstly, the High Court ignored the ECJ's creation of its own *exceptional circumstances* doctrine. Building on the equivalence between Article 47 CFREU and Article 6(1) ECHR, the High Court relied on the "risk of flagrant denial of justice" as the standard of proof. This constitutes the standard used by the ECtHR for extra-territorial application of the ECHR in extradition cases, which is different from the threshold set by the ECJ in *LM* in the EAW framework, the latter being an intra-EU system of judicial cooperation.[102] In the wake of that, the High Court replaced the ECJ's wording (*substantial grounds* to believe the person will run *a real risk of breach* of his right to a fair trial) with the "nullification or destruction of the very essence of the right" of protection against the flagrant denial of justice. Such a fundamental misunderstanding had a knock-on effect on the consideration of the factual context. The High Court observed that the systemic deficiencies of the Polish judiciary "will affect the court level before which this respondent will be tried if he is surrendered".[103] In assessing the plentiful factual circumstances before it, and comments from the Deputy Minister of Justice on the respondent that undermined the presumption of innocence, the High Court however concluded that those statements were not capable of causing a real risk of flagrant denial of justice. This was so despite the acknowledged role of the Polish Minister in prosecution, control of courts' presidents and vice-presidents, and the disciplinary process.[104] On appeal, the Supreme Court sidelined the issue of the standard of proof, and developed its reasoning much more in line with the "spirit" of the ruling in the preliminary reference. The Supreme Court concluded, however, that "while the individual features of this case are undoubtedly troubling . . . they do not bring the case over the threshold". The conclusion was based, *inter alia*, on the statements provided by the judge named as representative of the issuing judicial authority, who

102. *Celmer* (No 5) [2018] IEHC 639, para 32. This is not to say that the standard of "real risk" was created by the ECJ in the context of the EAW. It was used by the Court in Joined Cases C-411 & 493/10, *N.S.*, para 94, and by the ECtHR in cases of deportation or extradition and potential inhumane treatments. See, among many, ECtHR, *Saadi* v. *Italy*, Appl. No. 37201/06, judgment of 28 Feb. 2008, para 125.

103. *Celmer* (No 5) [2018] IEHC 639, paras. 93–98.

104. Ibid., para 117.

dismissed the statements of the Minister on the defendant "as little more than the type of statement made by a politician".[105] The conclusions in both judgments, however, opt for a stricter understanding of the "real risk", which triggers the question of whether the test has been placed in the correct area of the spectrum of probability.

As the interference of the Polish Government with the independence of the judiciary increased through legislative changes and disciplinary actions, executing courts across the Union have become increasingly cautious about surrender of persons to Poland. The District Court in Amsterdam[106] – the only one in the Netherlands considering EAW cases – suspended the surrender in all EAWs from Poland[107] and put the question to the ECJ as to whether the deterioration of the independence of the judiciary would be enough to refuse surrender – a question to which the ECJ, as mentioned above, answered in the negative.[108] The High Regional Court (HRC) of Karlsruhe refused execution after applying the *exceptional circumstances* test and taking into account the impact of the further government reforms.[109] On the same grounds, the Italian Supreme Court ordered a lower court to consider the possible impact of these reforms on its previous decision to surrender.[110]

The situation post-*LM* offers a diverse picture of implementation of the test at national level, which gives an idea of how far from straightforward the application of the fundamental rights exception is. This is especially so when it comes to judicial independence, where the test in itself and the fact-finding process is likely to be particularly complex. While a blanket suspension of the mechanism is difficult to square with the national courts' duties under EU law, a two-step assessment supported by a request for information to the issuing State's authorities would be unproblematic. This is what the HRC of Karlsruhe did. The District Court of Amsterdam did the same, in the context of the EAW that led to *L. and P.*, where some of the questions from the executing

105. *Artur Celmer*, [2019] IESC 80, paras. 86–87.

106. For a broader analysis of the practice of this court with regard to the EAWs, see Martufi and Gigengack, "Exploring mutual trust through the lens of an executing judicial authority: The practice of the Court of Amsterdam in EAW proceedings", 11 NJECL (2020), 282–298.

107. This sparked an equal and opposite reaction by the Polish National Public Prosecutor. See Jałoszewski, "Poland's National Public Prosecutor is going to war with the Netherlands", available at <ruleoflaw.pl/polands-national-public-prosecutor-is-going-to-war-with-the-netherlands/>.

108. See Wójcik, "The Netherlands will extradite no-one to Poland under European Arrest Warrant", available at <ruleoflaw.pl/the-netherlands-will-extradite-no-one-to-poland-under-european-arrest-warrant/>.

109. Wahl, "Fair trial concerns: German Court suspends execution of Polish EAW", available at <eucrim.eu/news/fair-trial-concerns-german-court-suspends-execution-polish-eaw/>.

110. Decision available at <www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snpen&id=./20200526/snpen@s60@a2020@n15924@tS.clean.pdf>.

authority reached the Disciplinary Chamber of the Supreme Court in Poland but received no response. While no definitive conclusions should be drawn from silence, this is also a factor that cannot be overlooked in the present context. In other words, it is argued that the *exceptional circumstances* doctrine affords national courts room to comply with EU law and refrain from surrender in cases that give rise to concerns in terms of a fair trial.

There are, however, questions outstanding concerning the fate of the suspect or convicted person once execution has been refused. If the executing court has no jurisdiction over the case, exploring the existence of other Member States that might take over the case would offer limited relief and significant practical problems. The State with jurisdiction would have to agree to take charge, but the file of the case and the evidence-gathering process might not be straightforward – especially considering that the authorities in a position to facilitate the process would be those who have been considered untrustworthy. If no State other than the issuing one has jurisdiction, the option in sight seems to be to let the person walk free. The outcome would bring us back to square one, with the considerations made above about impunity and breach of the States' Treaty obligations under – primarily – Articles 3(2) and 4(3) TEU. As the law stands at present, it is inevitable that the conundrum is resolved on a case-by-case basis, by balancing whether the specific circumstances trump the need to preserve the effectiveness of cooperation.

5. Invalidity

The ECJ has carried out a certain judicial harmonization on the basis of the EAW FD, by defining key words to the EAW mechanism as autonomous concepts of EU law.[111] Such a thread of judgments forms part of a broader case law, where the ECJ has interpreted possible causes of invalidity of an EAW. Invalidity constitutes a more radical exception to execution than that based on fundamental rights, since it results in the legal non-existence of the EAW and gives no discretion as to its recognition and execution. This section focuses on the concept of *judicial authority* in that respect. It discusses the Court's flexible understanding of the concept of judicial independence and its systemic consequences.

111. Mancano, "Judicial harmonisation through autonomous concepts of European Union Law: The example of the European Arrest Warrant Framework Decision", 43 EL Rev. (2018), 69–88; Mitsilegas, "Autonomous concepts, diversity management and mutual trust in Europe's area of criminal justice", 57 CML Rev. (2020), 45–78.

5.1. *General principles of judicial authority and effective protection*

The definition of *judicial authority* as an autonomous concept of EU law has become a topic of an emerging body of law on causes of invalidity. The starting point is the definition of an EAW which, according to a joint reading of Articles 1(1) and 6(1) FD, is a judicial decision issued by a Member State judicial authority. Firstly, the ECJ founds its reasoning on the premise that the high level of confidence on which the EAW is built requires proper judicial oversight, which in turn can be guaranteed in the presence of respect for judicial independence and separation of powers.[112] Therefore, EAWs issued by the police service or ministry of justice cannot be considered valid.[113] This is consistent with the evidence-based approach to mutual trust discussed in the previous sections, and confirms once more the understanding of judicial independence as a fundamental precondition for the functioning of the EAW.

Secondly, the Court has clarified that *judicial authority* covers authorities of a Member State which, although not necessarily judges or courts, participate in the administration of criminal justice in that Member State.[114] This broader understanding of judicial authority accommodates the diversity of national systems of criminal justice[115] and the wide range of scenarios where judicial cooperation in criminal matters governed by EU law occurs.[116]

Thirdly, the issuing authority must be in a position to give assurances to the executing judicial authority that there exist, in the issuing State, statutory rules and an institutional framework capable of guaranteeing the independence of the issuing authority in the exercise of the responsibilities flowing from the EAW FD.[117] The element of reassurance and cooperation confirms the picture of an EAW built on the joint operation of mutual trust and sincere cooperation, with judicial independence as a fundamental precondition.

Fourthly, the "issuing judicial authority" must be capable of exercising its responsibilities objectively, taking into account all incriminatory and exculpatory evidence, without being exposed to the risk that its

112. Case C-477/16, *Ruslanas Kovalkovas*, C:2016:861, para 44.

113. Case C-452/16 PPU, *Krzystof Marek Poltorak*, EU:C:2016:858; Case C-477/16, *Kovalkovas*.

114. Case C-477/16, *Kovalkovas*, para 31.

115. E.g. public prosecutors in Italy are independent members of the judiciary.

116. There are instances, e.g. in the investigation phase or as far as exchange of evidence is concerned, where public prosecutors are equally or more likely to be the main institutional actor involved in the cooperation.

117. Joined Cases C-508 &/18 & 82/19 PPU, *Minister for Justice and Equality* v. *OG and PI*, EU:C:2019:456, para 74.

decision-making power be subject to external directions or instructions, in particular from the executive.[118]

Fifthly, it is important to remember that the existence of a national arrest warrant or other enforceable judicial decision,[119] on which the EAW must be based, is another condition of validity of the latter.[120] With that in mind, the ECJ has observed that the EAW system entails a dual level of protection: the first level relates to the adoption of the national decision, such as a national arrest warrant; whereas the second must be afforded when an EAW is issued.[121] The second level of protection – that related to the issuance of the EAW – entails that the judicial authority competent to issue an EAW must review observance of the conditions necessary for the issuing of the warrant, and examine whether it is proportionate to issue that warrant.[122] Such a level of protection must be ensured even where the EAW is based on a national decision delivered by a judge or a court.

Sixthly, where the law of the issuing Member State confers the competence to issue an EAW on an authority which is not itself a court, the decision to issue such an arrest warrant and the proportionality of such a decision must be capable of being the subject, in the Member State, of court proceedings which meet in full the requirements inherent in effective judicial protection.[123] A broader understanding of judicial authorities, capable of acting in a framework of judicial cooperation based on mutual trust and automaticity, is thus counterbalanced by a set of safeguards meant to ensure proper judicial oversight.

Judicial independence is a precondition for the definition of judicial authority. This is a fundamental component of the system of effective protection that must be guaranteed in the context of EAW procedures. Connected as they are, however, independence and the concept of judicial authority, on the one hand, and effective judicial protection, on the other, should not be collapsed together. In this sense, the existence of a judicial remedy against the decision, taken by an authority other than a court to issue an EAW, is not a condition for classification of that authority as an issuing judicial authority within the meaning of Article 6(1) FD – as long as that authority has institutional independence. The requirement of judicial

118. Case C-477/16, *Kovalkovas*, para 42.

119. This is understood as a measure adopted by a judicial authority to arrest a person subject to criminal proceedings, with the objective of bringing that person before a court for the purposes of fulfilling the acts of criminal procedure. See Case C-414/20 PPU, *MM*, EU:C:2021:4, para 57.

120. EAW FD, Art. 8(1)(c).

121. Case C-241/15, *Niculaie Aurel Bob-Dogi*, EU:C:2016:385, para 56.

122. Case C-477/16, *Kovalkovas*, para 47.

123. Joined Cases C-508/18 & 82/19 PPU, *OG and PI*, para 75.

oversight of a decision taken by a body that is not a court or tribunal does not fall within the scope of the statutory rules and institutional framework of that authority, but concerns the procedure for issuing such a warrant, which must satisfy the requirement of effective judicial protection.[124] That protection must be in place in the issuing State and activated *before* execution of the EAW: a national law providing for judicial review only *after* surrender would not meet the requirements inherent in Article 47 of the EU Charter of Fundamental Rights.[125]

5.2. *The variable degree of independence*

These features show that the principles that have emerged from the analysis of the EAW so far apply *mutatis mutandis* to the concept of judicial authority. Five judgments on the concept of "judicial authority" were issued in 2019 alone. These preliminary rulings were mostly concerned with the independence of national public prosecutor's offices, and their capacity for meeting the necessary requirements of *issuing judicial authority*.[126] The saga was opened by two judgments concerning the Prosecutor General of Lithuania[127] and that of Germany.[128] As to the former, the ECJ observed that it prepares the ground for the exercise of judicial power by the criminal courts of that Member State. Therefore, it is capable of being regarded as participating in the administration of criminal justice.[129] In exercising the powers conferred on it, the Prosecutor General of Lithuania must satisfy itself that the requirements necessary to issue an EAW are met. The constitutional framework of Lithuania guarantees the Prosecutor General of Lithuania the benefit of that independence. This led the Court to the finding that that authority is covered by Article 6(1) EAW FD. However, the ECJ took care to clarify that the executing authority should determine whether a decision of the Prosecutor General to issue an EAW may be the subject of court proceedings which meet in full the requirements inherent in effective judicial protection.[130]

124. Joined Cases C-566 & 626/19 PPU, *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie* v. *JR and YC*, EU:C:2019:1077, paras. 48 and 63.

125. Case C-648/20 PPU, *PI*, EU:C:2021:187, para 60.

126. One of them concerned EAWs issued for enforcement of judgments, and not directly relevant for the present discussion. See Case C-627/19 PPU, *Openbaar Ministerie* v. *ZB*, EU:C:2019:1079.

127. Case C-509/18, *Minister for Justice and Equality* v. *PF*, EU:C:2019:457.

128. Joined Cases C-508/18 & 82/19 PPU, *OG and PI*.

129. Case C-509/18, *PF*, EU:C:2019:457, para 42.

130. Ibid., para 56.

The ECJ came to the opposite conclusion in the case of the German public prosecutors. According to German Law, the German Minister for Justice has an "external" power to issue instructions in the specific case to the public prosecutor's office, which in turn enables the Minister to have a direct influence on a decision concerning the EAW.[131] Though featuring safeguards concerning dismissal of officials and modality of writing and notification of the instructions, the exercise of the minister's powers was not specifically regulated.[132] Therefore, the influence of the executive on the decision of issuing of an EAW could not be wholly ruled out and the public prosecutor's office could not be considered a judicial authority under Article 6 EAW FD.[133]

The picture has acquired further nuances with the assessment of the French public prosecutor's office which was found to satisfy the prerequisite of judicial independence.[134] That independence – enshrined in the constitution and the criminal code – is jeopardized neither by the fact that the Ministry of Justice can issue *general* policy instructions, nor by the fact that the judges attached to the prosecutor's office issuing the EAW must comply with directions from hierarchically superior magistrates within that office. Public prosecutors possess the quality of *judicial authority*, provided that they demonstrate *in particular* (a) external independence which in turn can be undermined (b) if the executive is empowered to provide instructions in the specific case. While such an approach fails to take account of concerns about internal independence – as the ECtHR understands it, namely pressure from *within* the judiciary – the ECJ still requires judicial oversight offering guarantees of effective protection. In the French legal system, an EAW is based on a national warrant issued by a court (usually an investigative judge) who also reviews the conditions for the issuance of the EAW and its proportionality. Furthermore, the person can challenge the validity of the decision at the basis of the EAW.

Judicial oversight (guarantee of effective judicial protection) "saves" the validity of an EAW even if the issuing authority can be subject to instructions from the executive in a specific case. The reasons for this emerge clearly from

131. Joined Cases C-508/18 & 82/19 PPU, *OG and PI*, paras. 76–77.

132. Ibid., paras. 81–83.

133. For Germany's reaction to the judgment, see Ambos, "The German Public Prosecutor as (no) judicial authority within the meaning of the European Arrest Warrant: A case note on the CJEU's judgment in OG (C-508/18) and PI (C 82/19 PPU)", 10 NJECL (2019), 406. See also the note of Germany, available at <www.ejn-crimjust.europa.eu/ejnupload/News/WK-6666-2019-INIT.PDF>. See also Eurojust and EJN joint document about the situation in the Member States, available at <www.ejn-crimjust.europa.eu/ejn/EJN_RegistryDoc/EN/3079/98/0>.

134. Joined Cases C-566 & 626/19 PPU, *Parquet général du Grand-Duché de Luxembourg.*

the ECJ's judgment on the Austrian public prosecutor's offices, which are authorities tasked with issuing arrest warrants. They are hierarchically subordinate to higher public prosecutor's offices, which in turn are subordinate to the Federal Minister for Justice. However, the warrants must be endorsed by a court which carries out a review of the conditions and proportionality. In the absence of such an endorsement, arrest warrants do not produce legal effects and cannot be transmitted. In that context, the objective and independent judicial review offsets the risk that the public prosecutor's office is subject, directly or indirectly, to directions or instructions in a specific case from the executive.[135] In a case concerning Sweden's public prosecutor's office, moreover, the ECJ has recalled that Article 10 Directive 2013/48/EU – so-called Access to a Lawyer Directive – obliges the competent authority in the *executing* State to inform the person concerned of their right to appoint a lawyer in the issuing State.[136]

What if the national legislation of the issuing State does not provide for a judicial remedy against the decision to issue an EAW taken by an authority which, though in line with the requirements of independence set by the ECJ, is not a court or tribunal? As mentioned above (5.1), the requirement of effective protection is met on condition that the judicial review takes place in the issuing State before surrender. Furthermore, the national court competent to review the legality of the provisional detention post-surrender must be able to review incidentally the legality of the EAW, and in particular the existence of a national arrest warrant or any other enforceable judicial decision.[137]

Judicial oversight is equally important in the phase of execution of the warrant. This is especially the case since "the intervention of the executing judicial authority constitutes the sole level of protection provided for by [the EAW FD]" to guarantee that, in executing the warrant, the appropriate safeguards were afforded to the person concerned.[138] Just like the issuing judicial authority, the executing body in charge of executing an EAW must act independently and exercise its responsibilities under a procedure which complies with the requirements inherent in effective judicial protection.[139]

135. Case C-489/19 PPU, *NJ*, EU:C:2019:849.

136. Case C-625/19 PPU, *Openbaar Ministerie* v. *XD*, EU:C:2019:1078, para 55.

137. Case C-414/20 PPU, *MM*, para 74. However, a finding by that court that the EAW was issued in the absence of a national arrest warrant and was therefore invalid, does not trigger an automatic obligation to release the person placed in provisional detention after surrender to the issuing State. It is for the referring court to decide, in line with its national law, what impact the absence of such a national warrant has on the decision to hold the person in detention. See Case C-414/20 PPU, *MM*, para 82.

138. Case C-510/19, *AZ*, EU:C:2020:953, para 53.

139. Ibid., para 70.

5.3. *A patchy legal framework or an emerging system of EU criminal justice?*

What are the consequences of this law in terms of judicial independence, mutual trust and the functioning of the EAW? According to Böse, the case law of the ECJ presents a series of incongruities that are difficult to reconcile with one another.[140] First, the ECJ includes public prosecutors in the concept of judicial authorities and requires them to be independent, but has in the past acknowledged they do not possess the necessary independence to raise a question for a preliminary ruling.[141] Second, the ECJ's reasoning seems to imply that only courts and tribunals are endowed with the requirements to issue EAWs, while mutual recognition instruments in criminal law generally treat public prosecutors as judicial authority. Furthermore, the right to a fair trial, to a legal remedy and the right to liberty do not require *ex ante* judicial oversight.[142] Third, the Court overemphasizes the importance of external independence at the expense of impartiality and independence from within the judiciary.

While those concerns are understandable, the present author argues that the apparent inconsistency softens once these judgments are put in perspective. There is no doubt that "judicial authority" encompasses courts and tribunals as well as public prosecutors. However, independence is a complex concept and consists of different dimensions. Considering the way prosecution services are organized and their constitutional role, complete internal independence and impartiality cannot be realistically expected. The ECtHR's case law itself shows that the protection offered by internal independence focuses on courts and tribunals,[143] and that the public prosecutor's office is not bound by the obligations of independence and impartiality that Article 6 imposes on a "tribunal"[144] unless they are acting as judicial officers in charge of review under Article 5(3) ECHR[145] – which is different from issuing an EAW.

The ECJ's interpretation is precisely geared towards systemic coherence. External independence is the *trait d'union* that keeps courts, tribunals and

140. See Böse, "The European Arrest Warrant and the independence of public prosecutors: OG & PI, PF, JR & YC", 57 CML Rev. (2020), in particular at 1269, 1275.

141. Case C-74/95, *Criminal proceedings against X*, EU:C:1996:491, paras. 19–20.

142. Case C-583/13 P, *Deutsche Bahn AG* v. *European Commission*, EU:C:2015:404, paras. 46–48.

143. Sillen, "The concept of 'internal judicial independence' in the case law of the European Court of Human Rights", 15 EuConst (2019), 104–133.

144. ECtHR, *Thiam* v. *France*, Appl. No. 80018/12, judgment of 18 Jan. 2019, para 71.

145. ECtHR, *Pantea* v. *Romania*, Appl. No. 33343/96, judgment of 3 March 2003, paras. 236–239.

public prosecutors under the same umbrella (judicial authority) while at the same time ensuring a certain consistency across EU criminal law. In a polity like the EU, where State-based organization of the justice systems goes hand in hand with a mechanism of surrender built on automaticity, the balance between ground rules and flexibility is key. The ECJ is not restricting the concept of issuing judicial authority to courts and tribunals, but is requiring a minimum degree of judicial supervision; hence the requirement that the "decision *on* issuing a warrant" is taken by a judicial authority that meets the requirements inherent in effective judicial protection, which suggests the overseeing nature of the task.[146] A requirement that only a completely independent public prosecutor can validly issue EAWs would raise concerns in terms of democratic accountability and rule of law,[147] but this is not the ECJ's position.

In a nutshell, at least in this case, the Court is upholding a long-standing argument haunting the coming into being and development of EU criminal justice: an efficient system of transnational law enforcement requires effective guarantees for the individual. Mutual trust cannot be a mere leap of faith. This reflects the conceptual trajectory followed by the ECJ in refining mutual trust over the years, a presumption that has strong foundations, reinforced by common standards (see, for instance, the reference to the Access to a Lawyer Directive in the above-mentioned case on the Swedish public prosecutor's office) and safeguards.

Far-reaching effects of this case law on mutual recognition in criminal matters are generally not easy to predict. Recent developments, however, reveal a certain degree of flexibility in the interpretation of judicial authority, depending on the right at stake. In the context of the European Investigation Order (EIO) Directive,[148] a measure establishing a framework for mutual recognition of investigative measures and exchange of evidence, it has been found that public prosecutors are indeed issuing judicial authorities even if they are exposed to the risk of being subject to instruction in the specific case.[149] Firstly, Article 2(c)(i) of the Directive explicitly includes public prosecutors in the list of authorities that can issue a EIO – unlike the EAW FD. Secondly, the Directive lays down a series of procedural guarantees that have no equivalent in the EAW FD.[150] The structural differences between the EAW and EIO help make sense of the variable understanding of judicial authority. The EIO Directive is a post-Lisbon instrument of judicial cooperation in

146. Case C-216/18 PPU, *LM*, para 56.
147. See Böse, op. cit. *supra* note 138, 1277, and Ambos, op. cit. *supra* note 131, 405.
148. Directive 2014/41/EU, O.J. 2014, L 130/1.
149. Case C-584/19, *Staatsanwaltschaft Wien* v. *A and others*, EU:C:2020:587.
150. See in particular Directive 2014/41/EU, Arts. 2(d), 6(1), 6(3), 10, 11(1)(f), and 14(1).

criminal matters and its built-in safeguards reveal a higher level of "maturity". Furthermore, it concerns a phase of criminal proceedings where the law enforcement authorities and prosecution offices are usually more involved. Most importantly, it does not entail – unlike the EAW – deprivation of liberty of the person concerned for around 70 days, if the time limits of the FD are complied with.

The law is therefore not as irrational as it might look prima facie, although questions remain on the table involving the interplay amongst judicial independence, sincere cooperation and mutual trust in the unfolding of the EAW mechanism. We have seen that judicial supervision has the salvific capacity to render the EAW a "judicial decision" under Article 1(1) FD, even if it originates from a body that in itself lacks the requirements of "issuing judicial authority".

Does the Court approach judicial independence in the context of *judicial authority* differently, as compared for example to the *exceptional circumstances* doctrine? The answer is in the negative, although there seems to be some variety in the *degree* of independence that is required of the issuing authority. The issuing authority and the trying court or tribunal in the issuing State post-surrender are subject to different standards because they perform different tasks. The absence of impartiality does not prevent the prosecutor from meeting the requirements of Article 6(1) FD, but there must be fully independent – internally and externally – judicial supervision in the issuing and executing States. The same level of (full) independence is, however, required of the trying court, on the one hand, and the judicial authorities supervising the EAW procedures in the issuing and executing States, on the other hand.

So far, the compatibility of these supervising bodies in the Member States with the principles established in the case law has not been challenged. This leads to the second question: if the designated (issuing, rather than supervising) authority in a Member State falls short of the standards set by the ECJ and its EAWs are therefore invalid, would the ECJ's case law on judicial authority be de facto suspending the EAW towards that State?[151] In this regard, it is important to recall the distinction drawn by the Court between deficiencies in judicial independence caused by the statutory rules and institutional framework, on the one hand, and systemic deficiencies, on the other. The former can occasion the invalidity of *all* the EAWs issued by the entrusted authority in the State in question, whereas the latter must be dealt

151. See Mancano, "European Arrest Warrant and independence of the judiciary. Evolution or revolution?", *Diritti Comparati*, 2 Sept. 2019, available at <www.diritticomparati.it/european-arrest-warrant-independence-judiciary-evolution-revolution/>; Böse, op. cit. *supra* note 138, 1279.

with in the context of the *exceptional circumstances* doctrine.[152] Furthermore, what would happen if the deficiencies in the statutory rules and institutional framework affected the supervising body in a Member State?

In both cases, a legally sound course of action would see the executing court, pursuant to Article 15(2) FD and 4(3) TEU, act as follows. Firstly, it should exchange information with the issuing State. The latter must, indeed, provide reassurance as to the existence of statutory rules and an institutional framework capable of guaranteeing the independence of the issuing authority. Should it emerge that the issuing State law does not clearly meet the standards set by the ECJ, a preliminary reference should be sent to the ECJ. If the latter finds "against" the issuing State, the ECJ could declare that Articles 1(1) and 6(1) FD prevent a national law of that kind, thus obliging the issuing State to adjust its legislation to the EU standards – and possibly offering an interpretation whereby the EAWs already issued remain temporarily valid, pending retrospective judicial validation, as happened in Germany. We have also seen the ECJ acting with urgency by means of interim measures.[153] This would constitute another avenue – jointly with the preliminary ruling – to ensure (or at least push for) compliance with EU law without violating institutional prerogatives and possibly breaching horizontal sincere cooperation under Article 13(2) TEU. Should the Court, instead, provide the executing court with a less prescriptive answer and leave discretion in the assessment of the independence of the issuing authority, the executing court might have to apply the *exceptional circumstances* doctrine and approach these "reassurances", as outlined, in that context: namely, carrying out an overall assessment of the sincerity of the cooperation and trustworthiness of the issuing authority, by relying on specific materials on the basis of a probability assessment.

6. Conclusion

Since its introduction, the EAW has been the catalyst of important developments for the EU legal order. This is not particularly surprising, considering the significant innovation that it brought about to inter-State

152. Joined Cases C-354 & 412/20 PPU, *L and P*, paras. 47–51. The present author is aware that such a distinction between systemic deficiencies and statutory rules, especially in relation to judicial independence, might be prone to interpretative controversy. In fact, this might well be one of the next key aspects of development in the judicial dialogue between the ECJ and national courts in this area.

153. See Sarmiento, "Interim revolutions: The CJEU gives its first interim measures ruling on the rule of law in Poland", available at <eulawanalysis.blogspot.com/2018/10/interim-revolutions-cjeu-gives-its.html>.

criminal matters. The EAW is an essential line of defence for the safe exercise of free movement. It is built through an automatic mechanism of surrender based on the presumption that, save in exceptional circumstances, the States involved in cooperation respect fundamental rights.

The systemic assessment of the EAW carried out in this article has shed light on some of its defining traits. First and foremost, mutual trust is part of a network of general principles, and rests primarily on Article 4(3) TEU. The conceptual roots of mutual trust, firmly anchored in sincere cooperation, have practical consequences insofar as the former cannot operate without the latter. This is apparent when mutual trust – the presumption that Member States comply with fundamental rights save in *exceptional circumstances* – is applied to a system of judicial cooperation for transnational surrender based on automaticity. That cooperation involves the issuing and the executing authorities as well as the ECJ as the designed "interpretative dispute settlement body". Judicial independence is the cornerstone of the sincere cooperation-mutual trust structure. This concerns the independence of the actors of cooperation involved in the EAW procedures as well as the bodies in charge of proceedings in the issuing State post-surrender.

In that context, the legal regime of exceptions to execution of an EAW is the key to better understanding its identity. The FD was adopted at a time when no Member State was expecting a systemic backsliding in fundamental aspects of the rule of law such as judicial independence. That also explains why, for almost 15 years, the mandatory and optional grounds for refusal embedded in the FD were considered the only possible exceptions to execution. The nature of those exceptions and the evolving interpretation of the ECJ, however, have been revelatory. Those grounds do address most fundamental rights concerns that might accidentally arise during an EAW procedure, but (nearly) always on the assumption that justice is being done and that (an undefined concept of) impunity is generally avoided.

Nonetheless, scenarios may materialize where the balance between complying with fundamental rights and pursuing justice (understood strictly as completion of criminal proceedings) is harder to achieve. This is where the *exceptional circumstances* doctrine comes into play, also referred to as the fundamental rights exception. The doctrine, developed with regard to inhumane treatment and the right to an independent tribunal, consists of a two-step test: (1) systemic deficiencies affecting the right at stake in the issuing State are liable to (2) affect the specific situation of the person subject to the EAW. The rebuttal of the presumption of mutual trust and refusal of execution of the EAW, to which the doctrine is geared, requires that a real risk of violation in the issuing State is proved. That standard, it is believed, requires a moderate level of risk. This, in turn, provides the executing courts with a

certain degree of flexibility, when assessing the factual circumstances underlying the EAW brought before them. In the application of the test, the gathering of materials on the part of the executing authority, to be pursued also with the assistance of the issuing authority, is an essential part of the process. Independence and sincere cooperation are, once again, preconditions for the functioning of the framework. The issuing authority must provide the information promptly and accurately, while the executing authority must request the additional elements necessary to take a decision on the EAW, implement the test properly, and pose a question to the ECJ in case of interpretative doubts. For cooperation to be deemed sincere, however, the judicial authorities involved must at the very least be independent.

The assessment of independence in the context of the *exceptional circumstances* doctrine focuses primarily on the court or tribunal with jurisdiction over the proceedings for which the EAW was issued, and entails an evaluation of both its independence and impartiality. However, the independence of the issuing authority is of fundamental importance too. In this context, the emphasis is particularly on (a) independence of the issuing authority – which could be, in the case of the EAW, a public prosecutor as well – from the executive, and (b) the requirement of fully independent judicial supervision throughout the EAW procedures. These two conditions must be guaranteed by the relevant statutory rules, in the absence of which the EAW is invalid and must not be executed. The reassurances that must be given in this respect by the issuing authorities bring up, once again, the role of the sincerity of cooperation which can exist only when no interest other than the application of the rule of law is involved.

While plenty of important questions remain on the table, the developments discussed in this paper reveal the emergence of a very articulated set of principles underpinning an increasingly integrated EU system of criminal justice.